IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 106 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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BHIMJIBHAI DEVUBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 106 of 1998

MR MAHENDRA K PATEL for Petitioner No. 1

THROUGH JAIL for Petitioner No. 1

MR. N.D. GOHIL, A.P.P for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA

Date of decision: 24/07/2001

ORAL JUDGEMENT

1. The appellant - accused has filed this appeal through jail. He has challenged the judgement and order of conviction and sentence dated 28th November, 1997

passed by learned Sessions Judge, Valsad at Navsari whereby the appellant - accused was convicted for the offences under Section 376, 451 and 506(2), Indian Penal Code. He is sentenced to suffer seven years rigorous imprisonment for the offence under Section 376, Indian Penal Code and to pay a fine of Rs. 2000/- in default to further undergo six months simple imprisonment. He is also sentenced to suffer one year rigorous imprisonment for the offence under Section 506 (2), Indian Penal Code. However, no separate order of sentence was passed for the offence under Section 451, Indian Penal Code. The aforesaid sentences were ordered to run concurrently. The accused was in jail from the date of his arrest i.e. 18.09.1995 till date. Learned Judge passed the aforesaid order of conviction on 28.11.1997 in which the learned Judge ordered to give set off to the accused during the period which he had remained in prison.

2. Learned Counsel Shri. Patel, appearing as an amicus curiae for the appellant - accused vehemently submitted that the learned Sessions Judge committed an error in convicting the accused for the offences under Sections 376, 451 and 506(2), Indian Penal Code. He submitted that the prosecutrix was major at the time of incident and the very fact that no marks of injury were found on her body at the time of medical examination of the Doctor shows that it was a clear case of consent, therefore, the accused should have been acquitted by the learned Judge. He also submitted that there was a dispute regarding land between the parties, therefore, the name of the accused was falsely implemented in this case.

3. As per the prosecution case, prosecutrix Shardaben (Exh.10) was only 15 years old. However, it has clearly come out in the evidence of Doctor Jayant (Exh.6) that when he examined prosecutrix Shardaben on 16.09.1995 as per the radiological examination she was found to be 19 years old. In that view of the matter, it cannot be said that the prosecutrix was below 16 years at the time of commission of an offence. It is also true that Doctor Jayant, who had examined Shardaben after four days of the incident, clearly stated that no external mark of injuries on the body of Shardaben were found. However, he has clearly opined that there was a sexual intercourse with Shardaben between 48 to 76 hours. She was brought before him on 16.09.1995 at 2:30 p.m. and the incident took place on 12.09.1995 at 1:00 a.m. On this basis, it cannot be said that the incident did not take place on 12.09.1995. After all, it is an evidence in the form of opinion. The fact of sexual intercourse

with Shardaben could not be ruled out as per the medical evidence itself. In that view of the matter, it is difficult to believe that there was only a dispute for land between the parties, therefore the accused was falsely involved by allowing the real culprit to let go. It is true that no other injuries on the body of prosecutrix were found but that would not mean that it was a case of consent. Even assuming for the sake of the argument that as per the evidence of the Doctor she was 19, but her version that when she was standing on the ota of her house at 10:00 a.m. the accused who was aged about 45 years at that time took her inside the house forcibly and committed rape cannot be disbelieved. The evidence of Doctor Jayant who examined the accused shows that he was 45 and well built and girl was only aged 19. She would be shocked in the manner in which the accused forcibly raped her. In such type of cases, if there are no marks of injuries found on the body of prosecutrix, that would not lead to the conclusion that it was a case of consent. If it was a case of consent, then she would not have informed about the incident to her mother on the same evening. It has come in the evidence of the prosecutrix that while going away, he had threatened her with dire consequences if she disclosed the incident to anyone. Under the circumstances, if there was a delay of eighty-two hours in lodging F.I.R., that would not help the accused. The said delay is satisfactorily explained by the prosecution.

4. Once the evidence of prosecutrix Shardaben is believed that the accused took her inside the house, then the offence under Section 451, Indian Penal Code is complete. Most important aspect of the case which has not even been considered by the Trial Court is the admission made by the accused before the Doctor about entering the house of the prosecutrix on the date of the incident. Doctor Jayant, Prosecution Witness No.1 (Exh.6) has stated before him that when he examined accused he had stated before him that he had gone to the house of Shardaben at 8:00 A.M. on 12.09.1995. It is a different matter that he refused to admit that he had sexual intercourse with Shardaben on that day.

5. Mr.Patel, learned Counsel for the appellant-accused tried to submit that the accused was unable to enjoy sex and therefore it is difficult to believe that he had committed rape on Shardaben. In support of his submission Mr. Patel has tried to rely upon the evidence of Doctor Jayant who had stated that he tried to take sample of his sperm of the accused by asking him to do masturbation, but he could not get it

because he was tired. This has nothing to do with the physical disability of the accused. He was a middle aged man of about 45 when he was examined by the doctor . Admittedly, he was a married man therefore he may not be comfortable doing masturbation. In fact, the accused himself admitted before Doctor Jayant that just two days before his examination he had sexual intercourse with his own wife. Therefore, this submission of Mr. Patel that he was not capable of committing rape is ruled out.

6. Once the evidence of prosecutrix is found wholly reliable and the case of consent is ruled out, then her evidence is sufficient to convict the accused for the offence under Section 376, Indian Penal Code. In the instant case, her evidence is duly corroborated by the evidence of Doctor Jayant. In that view of the matter, other minor discrepancies in the evidence of the mother regarding lodging of F.I.R. and non-examination of persons like Sarpanch and Panchas turning hostile would not help the accused.

7. In view of the above discussion, it cannot be said that the learned Judge has committed any error in convicting the accused for the offences under Sections 376, 451 and 506 (2), Indian Penal Code.

8. Mr. Patel, then submitted that since 18.09.1995 the appellant - accused is in jail and by now he has almost undergone six years imprisonment. Therefore, the substantive sentence of seven years rigorous imprisonment by the learned Sessions Judge for the offence under Section 376 be reduced and the order of sentence as already undergone be passed. It is true that by now the appellant accused has almost undergone imprisonment of six years but having regard to the peculiar facts and circumstances of the case and the way in which the accused entered the house of the prosecutrix, dragged her in the house and committed rape, and threatened her with dire consequences, I am of the opinion that in such type of cases where the Trial Court imposed seven years rigorous imprisonment under Section 376, then such an order of sentence cannot be interfered by this Court in appeal. In view of the above discussion, this appeal fails and is dismissed.

(B.J.SHETHNA, J.)

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